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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO.

UNITED STATES OF AMERICA

v.

WALTER ELWOOD KRAMER, Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Western District of Pennsylvania which had adjudged petitioner guilty of violating Title 18 U.S.C., §152.

OPINIONS BELOW

The Opinion of the District Court and the Opinions of the Court of Appeals have not been reported but appear where respectively indicated in the Appendix of this Petition:

Opinion of the District Court (Appendix A);

Opinion of the Court of Appeals of December 11, 1959, affirming conviction (Appendix B);

Opinion of the Court of Appeals of June 21, 1960, affirming conviction (Appendix E).

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1959.[1] On December 22, 1959, a Petition for Rehearing was filed and was granted on March 18, 1960.[2] On June 21, 1960, the Court of Appeals entered judgment affirming the conviction.[3] The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

I

May a conviction of an alleged bankrupt upon a charge of fraudulently concealing assets from a Receiver in a bankruptcy proceeding be upheld where the Bankruptcy Court lacked jurisdiction because personal service upon the alleged bankrupt was not made in accordance with statutory requirements?

II

May a conviction of an alleged bankrupt upon a charge of fraudulently concealing assets from a Receiver in a bankruptcy proceeding be upheld when the bankruptcy proceeding was commenced by a false and fraudulent petition?

III

Where an Act of Congress provides a method for service on a bankrupt in a bankruptcy proceeding, *and there is no ambiguity*, may a Court ignore the specific Congressional edict and substitute a different manner of service?

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1. Appendix C.
2. Appendix D.
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CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

The following constitutional, statutory and procedural rules provisions are relevant:

I

United States Constitution, Amendment V:

". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law";

II

United States Constitution, Article I, Section 1:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

III

Title 11 U.S.C. § 23(b):

"The Court of bankruptcy which has jurisdiction of one of the general partners may have jurisdiction of all the general partners and of the administration of the partnership and individual property."

IV

Title 11 U.S.C. § 41(a):

"Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant. . . . Such service shall be returnable within ten days, unless the court shall, for cause

shown, fix a longer time, and shall be made at least five days prior to the return day, and in other respects shall be made in the same manner that service of summons is had upon the commencement of a civil action in the courts of the United States; but in case personal service cannot be made within the time allowed, then notice shall be given by publication in the same manner as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States. . . ."

V

Title 11 U.S.C. § 41(c):

"All pleadings setting up matters of fact shall be verified under oath."

VI

Title 18 U.S.C. § 152:

"Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of the bankrupt. . . ."

VII

Title 18 U.S.C. § 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy."

VIII

Federal Rule of Civil Procedure, Rule 4 (f):

"All process other than a subpoena may be served anywhere in the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state . . ."

STATEMENT OF THE CASE

Petitioner was indicted and tried upon seven counts of knowingly and fraudulently concealing assets from a Receiver in bankruptcy in violation of 18 U.S.C. §152. He was also indicted with Thomas Watkiss for conspiring to conceal assets from the Receiver and the Trustee in the same bankruptcy proceeding in violation of 18 U.S.C. § 371. Both indictments were consolidated for trial. At the conclusion of the Goverment's case, the trial judge directed a verdict of acquittal with respect to the seventh count in the indictment against petitioner individually. The jury acquitted petitioner and Watkiss of the conspiracy charge and found petitioner guilty only on one count of the indictment based upon Title 18 U.S.C. § 152, and found him not guilty on the remaining counts. Petitioner appealed from the judgment and commitment of the District Court of April 13, 1959.

The lone count of the indictment upon which petitioner was convicted stated that the Court below

"had due and competent authority and jurisdiction'" in the bankruptcy proceeding; that "on January 30, 1958, one L. Pat McGrath was duly appointed Receiver of and for the said" bankruptcy proceeding; that "on or about the 20th day of December, 1957,

and continuously thereafter up to and including the 19th day of March, 1958", petitioner "did knowingly and fraudulently conceal from the aforesaid Receiver of the Estate in bankruptcy, certain property valued in excess of $5,000"; that the property concealed consisted of nine specified items of equipment, and that this concealment was effected by transporting the property from Pittsburgh to Florida.

On December 10, 1957, a number of petitioner's creditors met in McKeesport, Pennsylvania, at which time three of those present signed a Petition in Bankruptcy. On December 11, 1957, the involuntary petition (Government Exhibit 21) in bankruptcy was filed in the United States District Court for the Western District of Pennsylvania against petitioner and Dolores Kramer, his then wife, individually and as partners doing business as Kramer Builders. The petition filed was on official bankruptcy form No. 5, each of three petitioning creditors signing twice, once under oath, and once without an oath.

Pursuant to Section 18 of the Bankruptcy Act, copies of the petition and a summons to Kramer and to his wife were turned over to the United States Marshal on December 11, 1957, for the required service. Each summons was returnable December 21, 1957 (Government Exhibit 38). On December 17, 1957, the creditors' attorney instructed the Marshal to serve the petition on Joseph P. Passafiume, Esq., whom he believed to be the petitioner's attorney. That same day the United States Marshal went to the office of Mr. Passafiume in Pittsburgh and attempted to serve Mr. Passafiume on behalf

of the petitioner. Mr. Passafiume refused to accept service and thereafter on December 19, 1957, the United States Marshal attempted to serve Mr. Kramer personally, which he did not succeed in doing. On December 27, 1957, the United States Marshal returned the subpoena for petitioner marked N.E.I. (Government Exhibit 38).

On December 27, 1957, the subpoena for service on petitioner's wife was extended by Order of Court until January 4, 1958. The subpoena was returned to the Court on January 13, 1958, service having been made upon petitioner's wife in Florida on December 30, 1957. The three creditors who had signed the involuntary petition in bankruptcy petitioned the Court on December 27, 1959, for permission to serve petitioner by publication. The petition was granted and the publication was made in the Pittsburgh Press on or about December 30, 1957.

On January 30, 1958, the Unted States District Court for the Western District of Pennsylvania adjudicated petitioner and his wife bankrupts, both individually and as partners doing business as Kramer Builders. On the same day an Order was issued, appointing L. Pat McGrath, Esq., Receiver. Mr. McGrath filed his bond as Receiver and on March 9, 1958 was appointed Trustee.

The petitioner left Pittsburgh for Florida on December 21, 1957 and did not return to the jurisdiction of the United States District Court for the Western District of Pennsylvania until March 19, 1958. Six days after his return to Pittsburgh, the petitioner appeared before Bankruptcy Referee for examination under Section 21 (a) of the Bankruptcy Act. During all this time, petitioner did not file an appearance in the bankruptcy proceeding, nor was he represented in said proceeding until

March 25, 1958, during his examination under Section 21(a). He subsequently filed a petition for an arrangement on April 22, 1958. Petitioner's wife never appeared in the bankruptcy proceeding.

At the trial of the case, the Government called as its witnesses the three creditors who signed the involuntary petition in bankruptcy. All three of them stated on cross-examination that they had actually signed the petition during the informal gathering on December 10, 1957. *Two of these petitioning creditors testified that they had never sworn to and subscribed to the petition before a Notary Public, although the petition purports to have been sworn to and subscribed before a Notary Public by all three petitioners on December 11, 1957.* (Appendix H, infra pp. 47, 48, 49) Petitioner offered to prove during the trial that he did not know that the petition in bankruptcy was fraudulent until it was revealed during the cross-examination of the three petitioning creditors. However, such offer was refused by the trial court.

The jury returned its verdict on February 13, 1959. On February 17, 1959, petitioner filed a Motion for New Trial on the ground that the bankruptcy proceeding was instituted by a fraudulent petition and therefore the entire bankruptcy proceeding, including the appointment of a Receiver, was void and of no effect. There having been no Receiver appointed, there could be no crime of concealing assets from a non-existent Receiver.

Petitioner also requested that the new trial be granted upon the ground that the bankruptcy proceeding was void for lack of jurisdiction in that the service requirements of Section 18(a) of the Bankruptcy Act

were not followed and therefore the Court which appointed the Receiver never had the jurisdiction to take such action. The trial court denied the motions.

An appeal was then filed to the United States Court of Appeals for the Third Circuit, and that Court, by Chief Judge Biggs, wrote an Opinion affirming the Judgment of Conviction. A Petition for Rehearing was filed with the United States Court of Appeals for the Third Circuit, and a rehearing was granted. Chief Judge Biggs filed a second Opinion on June 21, 1960, affirming the conviction on a basis other than the one in the Opinion filed on December 11, 1959. On July 1, 1960, a Petition for additional time to file a Petition for Writ of Certiorari was presented to the Supreme Court of the United States, and an Order was signed by Mr. Justice Brennan extending the time for filing such Petition to and including August 20, 1960.[1]

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1. Appendix G.

REASONS FOR GRANTING THE WRIT

I

A conviction of an alleged bankrupt upon a charge of fraudulently concealing assets from a Receiver must be set aside where the Bankruptcy Court which appointed said Receiver lacked jurisdiction because personal service upon the alleged bankrupt was not made in accordance with the statutory requirements.

One of the essential elements necessary to sustain the conviction of the petitioner is the requirement that he concealed assets of the bankrupt's estate from a Receiver. If the Receiver was not validly appointed, there cannot be a conviction. In the present case, for two specific reasons, there was no valid appointment of a Receiver in bankruptcy. The Bankruptcy Act in Section 18(a), [11 U.S.C. § 41 (a)] states that the alleged bankrupt shall be personally served with the Petition and a writ of subpoena. The service is returnable within ten days unless the Court shall, for cause shown, fix a longer time and *shall be made at least five days prior to the return date*. The section further authorizes service by publication when personal service cannot be made and provides as follows:

> "In the case personal service cannot be made *within the time allowed*, then notice shall be given by publication." (Emphasis supplied)

This section is crystal clear as to what is required for service. Basically, the bankrupt must be served with the Petition and a writ of subpoena and the service returnable within ten days. Further, such service must be made at least five days prior to the return

date. If personal service is attempted within five days of the return date and cannot be made, the United States Marshal has two alternatives; he can attempt to obtain from the Court, for cause shown, a longer time within which to attempt personal service; or if he attempted to make the service at least five days prior to the return date, he may then proceed with notice by publication. In the present case, the Government admits that the service within the dates prescribed by the Statute was not attempted nor accomplished.

The Stipulation agreed to by the Government and counsel for the petitioner in the court below shows that:

The Petition was filed on December 11, 1957, and that the United States Marshal first attempted to serve the petitioner on December 17, 1957, when he requested Joseph Passafiume, Esq., to accept service on behalf of Kramer. The United States Marshal did not attempt to make personal service on the petitioner within the time prescribed by the Statute. Personal service would have had to be attempted on or before December 16, 1957, if the service was to be made at least five days prior to the return date because the return date was ten days from December 11, 1957, to-wit, December 21, 1957. Mr. Passafiume refused to accept service. Thereafter, on December 19, 1957, the United States Marshal looked for Kramer in the Pittsburgh area for the purpose of serving him, but was unable to locate him. On December 27, 1957, the attorney for the petitioning creditors petitioned the District Court for leave to serve Kramer by publication. The petition was granted on that day. On or before December 30, 1957, Kramer was served by publication in the Pittsburgh Press.

Section 18(a) is specific as to the requirements for service by publication. A condition precedent to publication is that "personal service cannot be made *within the time allowed.*" (Emphasis supplied) The statute is clear that an attempt at personal service must be made at least five days prior to the return date. In the present case, such attempt was not made within the statutorily required period, and yet the service by publication was resorted to. The adjudication in bankruptcy was January 30, 1958. The Receiver was appointed January 30, 1958, and the Trustee was appointed March 20, 1958. Kramer, the petitioner, departed for Florida on December 21, 1957. It is conceded that petitioner did not immediately leave the jurisdiction and that he was in and about the City of Pittsburgh from the time the petition was filed and until ten days thereafter. The Marshal, under the law, was required to attempt a personal service on or before December 16, 1957, at which date Kramer was still within this jurisdiction. The Marshal did not attempt to serve Kramer. The earliest attempt at personal service on Kramer was December 19, 1957, three days after the Marshal's authority under the law to attempt such personal service expired.

Both at the trial and in the appellate court, the Government attempted to overcome the obviously improper service. The earlier government argument stressed the attempt of service on Mr. Passafiume. It must be observed that such an attempt was bad, at least for two reasons: Rule 4(f) of the Federal Rules of Civil Procedure provides that service may be made on an individual by serving an agent, *if the agent is authorized by appointment or by law to receive service of process.* Mr. Passafiume refused to accept service because he was

not authorized by petitioner to accept such service; furthermore, he was never a statutory agent to receive process. The second reason is just as obvious that this service was improper, because, as was pointed out before, service had to be made five days prior to the return date of the writ, that is, on or before December 16, 1957. Even the abortive attempt to serve Mr. Passafiume did not occur until December 17, 1957, in violation of the provisions of Section 18(a) of the Bankruptcy Act.

The Government then took the position that the service which was made on petitioner's wife in Florida was sufficient to give the Court jurisdiction to continue the bankruptcy proceeding. Briefly, the facts involved in the service on Dolores Kramer in Florida were as follows:

On December 27, 1957, the Court entered an Order extending the time within which to serve Dolores Kramer. Dolores Kramer was in Florida and was personally served in Florida on December 30, 1957. The Government then urged that under Section 5(d) of the Bankruptcy Act [11 U.S.C., §23(b)], which provides:

> "The court of bankruptcy which has jurisdiction of one of the general partners may have jurisdiction of all the general partners and of the administration of the partnership and individual property."

jurisdiction was obtained.

However, a reading of Section 18(a) of the Bankruptcy Act which we have previously discussed, and Rule 4(f) of the Federal Rules of Civil Procedure show that this argument is fallacious. Rule 4(f) of the Federal Rules specifically requires that the service must

be within the territorial limits of the State in which the District Court is held unless there is a statute of the United States which authorizes service beyond the limits of the State. In this instance, there was no such statute applicable. These arguments were presented by the government both in the lower court and in the appellate court, and both were held invalid by the United States Court of Appeals for the Third Circuit. The Appellate Court's Opinion filed December 11, 1959, specifically states (Appendix B, infra, p. 36):

> "On its face, this service was adequate in form, but it was clearly the intention of the draftsman of Section 18 that service by publication should not be resorted to unless personal service was first attempted to be made as prescribed by the section and personal service had failed. It is necessary to conclude, therefore, that the service by publication on Kramer was insufficient to enable the Court to obtain jurisdiction of his person."

The question involved here, therefore, is whether a court can bypass an improper service and thereby permit an individual to lose his freedom. The District Court of the United States obtains its power to adjudicate a bankruptcy proceeding solely from the Bankruptcy Act, since such court possesses only the power and authority conferred upon it by Congress. *Sheldon v. Sill*, 49 U.S. 441 (1850); *Mason v. Hitchcock*, 108 F. 2d 134, 135 (1st Cir. 1939). Therefore, could the District Court exercise jurisdiction in this particular matter where there was no service as required by the laws of the United States? It is argued that this question cannot be raised collaterally since the petitioner was adjudicated a bankrupt. However, this argument overlooks

the basic law of the United States that where a Court does not have jurisdiction in the first instance, all of its subsequent acts are void and illegal, and may be attacked at anytime. This has been the law at least dating back to 1850 when in the case of *Webster v. Reid,* 11 How. 437, 460 (1850), the Supreme Court stated:

> "There was also error in the district court, in overruling the evidence offered by the defendant to show that no notice was given by publication, as the Act requires. If jurisdiction could be exercised under the Act, it was essential to show that all its requisites had been substantially observed."

In an early action involving the collateral attack on an adjudication in bankruptcy, the Court in *Lamp Chimney Co. v. Ansonia Brass and Copper Co.,* 91 U.S. 656 (1876) stated:

> "Since a decree, adjudging a corporation a bankrupt, is in the nature of a proceeding in rem, as respects the status of the corporation; and, if the court rendering it has jurisdiction, it can only be assailed by a direct proceeding in a competent court, *unless it appears that the decree was void in form, or that due notice of the petition was never given."* (Emphasis supplied)

Perhaps the very short and terse statement from the case of *Amy v. Watertown (No. 1),* 130 U.S. 301, 316 (1889), substantially answers the question of the necessity of proper service by stating:

> "Where a particular method of serving process is pointed out by a statute, that method must be followed." See *Ferguson v. Quinn,* 123 Pa. 337, 344 (1889).

The Government then argued that assuming the service to be improper, the petitioner, when he filed for an arrangement on April 22, 1958, waived such defect and cured the jurisdictional problem. This argument bore fruit in the first Opinion filed by the United States Court of Appeals for the Third Circuit, where Chief Judge Biggs stated (Appendix B, infra, p. 36):

> "It follows that if there were no further cogent circumstances which required consideration, we would be compelled to conclude that the judgment of conviction here appealed from could be attacked successfully collaterally and would have to be vacated.
>
> "But on April 22, 1958, Kramer filed in the court below a petition for an arrangement . . . Under all the circumstances we hold that Kramer must be deemed to have submitted his person to the jurisdiction of the bankruptcy court."

In the Opinion of the United States Court of Appeals for the Third Circuit filed on December 11, 1959, that Court ruled that the service in this case was improper and the conviction would have to be set aside unless there were some other reason for curing the service defect. The Court then decided that the defect was cured when Kramer filed his petition for an arrangement on April 22, 1958, three months after the appointment of the Receiver and nearly one month after the last date claimed by the indictment that he concealed assets from the Receiver. After this Opinion was filed, petitioner was granted a rehearing, and a new Opinion was filed on June 21, 1960, wherein the Court recognized that its earlier Opinion of December 11, 1959, was im-

proper in light of the decision in *Pennoyer v. Neff*, 95 U.S. 714 (1877) which held:

> "The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

At that point, the United States Court of Appeals for the Third Circuit reversed its earlier Opinion that the petition for an arrangement cured the original defective service. The second Opinion then affirmed the conviction on grounds which will be discussed more fully in Point III of this petition.

From what we have pointed out, it follows that the bankruptcy court in this case never acquired jurisdiction over petitioner, and that it never had jurisdiction to appoint a Receiver. Therefore, the appointment of Mr. McGrath as Receiver was a nullity, and consequently he was never charged with the custody or control of any of the property allegedly belonging to the estate of the bankrupt. *A Receiver never having been legally appointed, it follows that the petitioner could not have knowingly and fraudulently concealed assets from the Receiver.*

II

A conviction of an alleged bankrupt upon a charge of fraudulently concealing assets from a Receiver must be set aside when the bankruptcy proceeding was commenced by a false and fraudulent petition.

The petition presented before the District Court to invoke its bankruptcy jurisdiction was fraudulent and therefore all matters thereafter were null and void. Section 18(c) of the Bankruptcy Act requires that a petition be verified by the petitioning creditors. In the present case, all three of the petitioning creditors signed the petition on the evening of December 10, 1957, at which time there was no Notary present. Moreover, two of the petitioning creditors unequivocally stated that they did not in fact subscribe to the petition before a Notary Public, even though the petition purports to be properly verified. (Appendix H, pp. 47, 48, 49) The question is therefore presented to the Court for determination whether such a petition, not properly sworn to as required by the Bankruptcy Act, conferred jurisdiction on the court? The closest case on point is the Opinion in the case of *In Re Frank*, 234 F. 665 (E.D. Pa. 1916), affirmed 239 F. 709 (3rd Cir. 1917). In that case, the petitioning creditors admitted that they did not swear to the petition before the Notary Public who attached his jurat thereto. The lower court upon hearing this testimony, dismissed the petition, at which time the petitioning creditors sought leave to amend the petition. The trial Judge denied the application, ruling:

> "The filing of a petition in bankruptcy is not a matter to be recklessly undertaken. The business,

the credit, the financial standing, the property and reputation of the person against whom the petition is filed are at stake. The filing of a petition is frequently followed by the appointment of a Receiver, which results in taking away from the alleged bankrupt all of his property, closing up and ruining his business and destroying his credit. Thus irreparable damage may result from an honest mistake. Stringent as the provisions of the act are, they do not contemplate that creditors may invoke the jurisdiction of the court where, without knowledge of the facts, they recklessly subscribe to a petition setting out the acts of bankruptcy without even *the so-called formality of having appeared before a notary public for the purpose of making oath to the petition, and where the notary public falsely certifies that oath was made before him. Such a certificate is not a verification. It is a falsification.*" (Emphasis supplied)

In Pennsylvania, there are a line of cases which are consistent with the case now before the Court relating to proper verification. Election cases generally involve the problem of a contest or a recount. Where a recount is requested, the petition must be verified by three individuals residing in the election district where the recount is requested. In a case which is very similar to the case now before the court, the trial judge ruled *In Re Taylor Township Election*, 79 D & C 193 (1951), that a faulty verification on a petition for a recount made the entire petition defective and any acts taken thereunder null and void. The Court quoted with approval part of the Opinion in *Horter v. Cohen*, 90 Pa. Super. 174, 175 (1926), as follows:

"If not sworn to, its character is not such as is contemplated by the Act; instead of its being a document verified by the sanctity of the oath, it is mere narration, and amounts to nothing. The absence of verification is fatal . . ." See also *North Union Township Election Case*, 250 Pa. 98 (1915).

The requirement of a verification to a petition in bankruptcy is not merely one of formality. Title 11, U.S.C. § 41(c), states:

"All pleadings setting up matters of fact shall be verified under oath."

The filing of a petition in bankruptcy is a very serious matter. It involves drastic consequences both personally and financially to the bankrupt and the creditors. A petition which is not properly verified is a fraud upon the Court and confers no jurisdiction whatsoever on the Court. Signers thereof cannot later object to having such a petition declared null and void.

It must be remembered that the fraud perpetrated upon the court below by the illegal petition was not patent upon the record. The fraud was first revealed upon cross-examination of the petitioning creditors at the time of this trial. Petitioner, when apprised of this at the time of the trial, requested that the case be continued so that he might directly attack the bankruptcy proceedings. This he was not permitted to do, and consequently, petitioner did everything possible to preserve his position with regard to the improper verification and improper service.

A judgment obtained by fraud upon the court may be collaterally attacked at any time. *Treines v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939). Furthermore, the

Courts have demonstarted that they will not countenance any fraud and have gone back a great number of years to undo a fraud perpetrated upon the Court. *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944) stated:

> "Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy, fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired . . ." P. 248.

Before the bankruptcy jurisdiction of a court may be properly invoked, the originating petition must comply strictly with the terms of the Bankruptcy Act. A defective and fraudulent petition places no jurisdiction in the court which receives it and any order relating to such petition is void and of no effect. Consequently, there never having been a valid petition filed, the Order appointing a Receiver was void ab initio and the petitioner could not have concealed anything from a non-existing person. Perhaps it would be fitting to close this point of the Brief with the further quote from the case of *In Re Frank*, Supra.:

> "It appears from the depositions that the petitioners in this case have been accustomed to having affidavits in bankruptcy proceedings taken in this manner. It is to be hoped that such a practice is not general among creditors in bankruptcy proceedings. But it is urged by counsel that:
>
> 'While in theory the taking of an oath out of Court is accompanied with a certain degree of for-

mality, in fact much of that formality is customarily dispensed with.'

"If that means that the practice which was followed in this case is that customarily followed, and that the appearance of the affiant, to a pleading to be filed in Court, before an officer who certifies that an oath has been taken before him, is a mere formality which is customarily dispensed with, it is sufficient to say that the custom will have no recognition in this court."

III

Where an Act of Congress provides a definite method for service on a bankrupt in a bankruptcy proceeding, a court may not substitute a different manner of service.

The questions raised in Points I and II of this petition were presented before the trial court and thereafter before the United States Court of Appeals for the Third Circuit on two separate occasions. On each of these three occasions, the answers furnished in each opinion were totally different. The trial court in considering the two questions filed an Opinion in which it held. (Appendix A, infra, p. 33):

"We think all defects in the verification, as well as in the service of the subpoena, were cured by the adjudication, and they are conclusively presumed to be correct. It is only where it appears on the face of the adjudication that the bankruptcy court was without jurisdiction that a collateral attack may be made."

Therefore, the court ruled that the two defects were cured by the adjudication and the appointment of a

Receiver in the bankruptcy proceeding. However, when the appeal was taken to the Appellate Court, the Opinion filed on December 11, 1959, by Chief Judge Biggs stated (Appendix B, infra, p. 36):

> "On its face this service was adequate in form but it was clearly the intention of the draftsman of Section 18 that service by publication should not be resorted to unless personal service was first attempted to be made as prescribed by the section and personal service had failed. It is necessary to conclude, therefore, that the service by publication on Kramer was insufficient to enable the court to obtain jurisdiction of his person. It follows that if there were no further cogent circumstances which required consideration we would be compelled to conclude that the judgment of conviction here appealed from could be attacked successfully collaterally and would have to be vacated.
>
> "But on April 22, 1958, Kramer filed in the court below a petition for an arrangement . . . It is apparent that Kramer filed a petition pursuant to the statutory provisions quoted. Under all the circumstances, we hold that Kramer must be deemed to have submitted his person to the jurisdiction of the bankruptcy court."

The Court of Appeals reversed the ruling of the trial court and stated that the service was ineffective. The Court of Appeals then stated that even though the service was ineffective, Kramer cured the defect when he filed a petition for an arrangement some three months after a Receiver had been appointed. However, it is apparent that the United States Court of Appeals was not con-

vinced of the correctness of the position when, after a rehearing and reargument and submission of briefs, the Court filed a second opinion on June 21, 1960, now ruling that the petition for an arrangement filed three months after the appointment of a Receiver could not validate the original appointment. The Court then proceeded to reverse its first Opinion and decided the question totally different from the trial court's Opinion and from its earlier Opinion stating as follows (Appendix E, infra, p. 45):

> "We conclude that if an attempt personally to serve an alleged bankrupt while he is within the state of the bankruptcy court has failed because it was not in accordance with the provisions of Section 18 (a) and the bankrupt then leaves the state, service may be made by publication."

The Court of Appeals has now found it necessary, in attempting to sustain the conviction, to legislate a new method of service not permitted by any Act of the Congress of the United States. The Court of Appeals has written into the law that service may be made by publication without following the clear mandate of Section 18(a) of the Bankruptcy Act as to the method and manner of providing service. It is apparent to all who read the three opinions in this case that there is total confusion over the requirements of service preceding the appointment of a Receiver in bankruptcy. No Court in the United States has the authority to do what the United States Court of Appeals for the Third Circuit attempted by its opinion filed on June 21, 1960. No court in the United States is permitted to take for itself the legislative power entrusted by Article 1, Section 1, of the United States Constitution and Article V of the Amend-

ments to said Constitution. This court has very recently ruled:

> "But this only serves to emphasize that if the statute is to be changed, it is for Congress, not for us, to change it." *United States v. American-Foreign Steamship Corp.*, 80 S. Ct. 1336, 1340 (June 20, 1960)

It has been a policy of the Supreme Court of the United States not to encroach on the legislative branch of the Goverment when the intent of the legislature is clear and unambiguous. The Court cannot substitute it judgment for that of the Congress of the United States. *Marbury v. Madison*, 5 U.S. 37 (1803); *Leffingwell v. Warren*, 67 U.S. 599 (1862). The doctrine of the separate functions of the Judiciary and Congress has nowhere been more clearly stated than by Justice Benjamin N. Cardozo in *Law and Literature* (1931), wherein he quotes Justice Marshall as follows:

> "The judicial department, he tells us, 'has no will in any case . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law.'" (P. 11)

There are a great number of cases decided by this court wherein it has been specifically stated that a Court may not modify a statute even if there are equitable reasons for so doing. *Chambers v. Lucas*, 41 F. 2d 299 (C.A. D.C. 1930); *Lewis v. United States*, 92 U.S. 618 (1875); *United States v. Durkee Famous Food*, 306 U.S. 68 (1939).

Perhaps this point may be more succinctly stated by quoting a passage from "The Spirit of Liberty, How Far is a Judge Free in Rendering a Decision" (1959), wherein the Hon. Learned Hand states:

> "In our country we have always been extremely jealous of mixing the different processes of government, especially that of making law, with that of saying what it is after it has been made. This distinction, if I am right, cannot be rigidly enforced; but like most of those ideas, which the men who made our constitutions believed in, it has a very sound basis as a guide, provided one does not try to make it into an absolute rule, like driving to the right. They wanted to have a government by the people, and they believed that the only way they could do it, was by giving the power to make laws to assemblies which the people chose, directly or at second hand. They believed that such assemblies would express the common will of the people who were to rule. Never mind what they thought that common will was; it is not so simple as it seems to learn just what they did mean by it, or what anybody can mean. It is enough that they did not mean by it what any one individual, whether or not he was a judge, should think right and proper." pp. 83, 84.

The problem posed by this case is one of major importance to each court in the United States and unless the Supreme Court of the United States takes cognizance of this matter and clarifies the issue, utter chaos and confusion will result in the interpretation of this serious question by the various courts. Either the Congress of the United States is right or the United States Court of

Appeals for the Third Circuit is right. Where a statute of the United States is unambiguous, the Court of Appeals has no right to substitute its method of service for that prescribed by the statute.

Conclusion

For the reasons set forth herein, we respectfully submit that this Petition for a Writ of Certiorari should be granted.

ALEXANDER COOPER
MELVIN SCHWARTZ
Attorneys for Petitioner.

APPENDIX A

Opinion and Order

MARSH, District Judge.

The defendant was found guilty by a jury of con cealing assets of a bankrupt partnership estate fron the receiver in violation of §152, Title 18 U.S.C. Thi verdict was on the first count of a 7 count indictmen He was acquitted on the other 6 counts and on an indict ment charging conspiracy.

He filed timely motions in arrest of judgment an for a new trial. The motion in arrest of judgment wa not pressed at argument, and we think the reason se forth is without merit.[1]

Three reasons were pressed for a new trial.[2] the are:

> "1. The Court erred in failing to grant th defendant's motion for judgment of acquittal o the ground that the proof in the Government's cas was to the effect that the petition in bankruptc was fraudulent, that the bankruptcy proceeding were invalid, and that, therefore, there could b

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1. United States v. Schireson, 116 F. 2d 881, 883 884 (3d Cir. 1940); cf. United States v. Weinbren, 12 F. 2d 826 (2d Cir. 1941).

2. Defendant's supplemental motion for new trial dated February 27, 1959, was filed out of time and may not be considered. Rule 33, Fed. R. Crim. P. which is mandatory; Rule 45(b)(2), Fed. R. Crim. P. United States v. Stirone, 168 F. Supp. 490 (W.D. Pa. 1957) aff'd 262 F. 2d 571 (3d Cir. 1958). But even if it were considered, the ground therein would be unavailing to defendant for the reasons set forth in this opinion. See also, 49 C.J.S., Judgments, §422.

no crime of concealing assets from a receiver or trustee in bankruptcy.

"2. The Court erred in failing to grant the defendant's request for instructions to the effect that if the jury should find that the petition in bankruptcy was not subscribed to before a notary public, their verdict must be for the defendant.

"3. The Court erred in not granting the defendant a continuance to permit the defendant to produce as a witness Mr. Joseph Burke."

Passing on the third reason first, we think it is without merit. Defendant requested a continuance to permit him to produce one Burke as a witness in surrebuttal in order to attack the credibility of the government's rebuttal witness, Passafiume. Over the government's objection the court granted the continuance upon defendant's representation that he would subpoena Burke and have him in court ready to testify at 10:00 o'clock the next morning. The witness was not subpoenaed and did not appear at 10:00 o'clock. The defendant informed the court that the witness had agreed to come but had overslept that morning. After waiting fifteen minutes, the court ordered defendant's counsel to proceed with his closing argument, and if the witness should in the meantime appear, upon request, he would be permitted to testify when defendant's argument was concluded. It was not until the government had completed its argument to the jury around 12:00 o'clock that the court was informed that the witness had finally arrived. Thereupon, the court sustained the government's objection to taking the testimony at that time and proceeded to charge the jury.

We think the ruling was within the court's discretion. The fact in issue, viz: whether the rebuttal witness Passafiume had been present on December 24, 1957, at the residence of defendant's mother, had been thoroughly litigated, Passafiume testifying he had not been present and the defendant's mother testifying that he had been present to collect a fee from her. The truth of this dispute had nothing to do with defendant's innocence or guilt on the first count; it simply was an attack on Passafiume's credibility. Without deciding whether Burke's proffered testimony was admissible for this purpose, we do not think it is incumbent upon a busy court to defer to the convenience of an unsubpoenaed witness who chooses to sleep.

The basis for the first and second reasons for a new trial is that the petitioning creditors failed to comply with §18(c) of the Bankruptcy Act[3] in that, although the petition purports to be verified by a notary public, they did not in fact subscribe to the petition before the notary. As the court recalls the testimony, several creditors of the partnership met with an attorney in the evening of December 10, 1957; that night three of them signed the creditors' petition. The petition was also signed by the attorney and bore the jurat of a notary public dated December 11, 1957, the day it was filed in this court. The notary, who was the secretary of the attorney for the petitioning creditors, was not present at the meeting. One creditor, Villi, testified he signed the petition on December 10th and also on December 11th at the attorney's office; the other two testified that

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3. "All pleadings setting up matters of fact shall be verified under oath." 11 U.S.C.A. §41(c).

they did not sign before a notary. From this testimony it could be inferred that at least two of the petitioning creditors did not take an oath to the petition in the actual presence of the notary public who attached her jurat.

Defendant contends he thus exposed at trial a jurisdictional defect of which he had no prior knowledge, and consequently the adjudication and appointment of a receiver were void. He, therefore, contends that he could not properly be found guilty of the offense charged in the first count.[4] He relies on *In re Frank,* 234 Fed. 665 (E. D. Pa. 1916). This case was affirmed by the Circuit Court at 239 Fed. 709 (3d Cir. 1917), but that court expressly refused to hold that the defect was jurisdictional. Other cases indicate a defective verification is not jurisdictional and may be amended or waived. *Armstrong v. Fernandez,* 208 U. S. 324; *In re Royal Circle of Friends Bldg. Corporation,* 159 F. 2d 539 (7th Cir. 1947) (no verification); *Green River Deposit Bank v. Craig,* 110 Fed. 137 (W. D. Ky. 1901) (one petitioner failed to verify); 8 C.J.S., Bankruptcy §116; 6 Am. Jur. Rev. Ed. §233 at page 695; see also cases referred to in 239 Fed. 709, 710; Collier on Bankruptcy, 14th ed., vol. 2, ¶18.37, page 84.

As stated heretofore, defendant was a partner in Kramer Builders; his wife was the other partner. She had been served personally with the writ of subpoena. Defendant had been served by publication. Subsequent to service, and in absence of an answer, a member of this

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4. Defendant did not move for judgment of acquittal at the close of all the testimony nor after verdict; however, it is proper to consider an alleged error of law on a motion for new trial. Maulding v. United States, 257 F. 2d 56 (9th Cir. 1958).

court adjudicated the partnership and the individuals bankrupts; a receiver and later a trustee was appointed. Great efforts were made to recover the assets of the partnership, and the defendant, after the Federal Bureau of Investigation located the physical assets, donated his services to the trustee. The insolvency of the partnership, was eminently apparent from the exhibits admitted in evidence. The docket entries, government exhibit 38, show defendant filed a petition for an arrangement under §321 of Chapter XI. It was not shown that any of the petitioning creditors were not bona fide creditors of the partnership in the jurisdictional amount.

Defendant was convicted of concealing only partnership assets from the receiver.

No direct attack on the adjudication was ever made by either debtor, individually or as a partner.

It is our opinion that an adjudication in bankruptcy is presumed to be regular and valid. *Edelstein v. United States*, 149 Fed. 636 (8th Cir. 1906); 49 C.J.S., Judgments §132. Although it may be shown to be invalid in a direct action or proceeding for that purpose, it may not be attacked collaterally in a criminal proceeding, especially when the record of adjudication shows on its face a duly executed and verified creditors' petition, service on the debtor partners, adjudication of bankruptcy by a district judge, and appointment and qualification of a receiver and trustee. *Cajiafas v. United States*, 38 F. 2d 3 (6th Cir. 1930; *United States v. Freed*, 179 Fed. 236 (C.C.S.D.N.Y. 1910); *Edelstein v. United States*, supra. Remington on Bankruptcy, 6th Ed., Vol. 9, §3502, page 107.

We think all defects in the verification, as well as in the service of the subpoena, were cured by the adjudication, and they are conclusively presumed to be correct. It is only where it appears on the face of the adjudication that the bankruptcy court was without jurisdiction that a collateral attack may be made. The record here does not disclose any jurisdictional defects; hence, although the adjudication and appointment of a receiver may be or may have been voidable in a direct attack, *In re Royal Circle of Friends Bldg. Corporation*, supra, they are not void and cannot be successfully attacked collaterally by oral testimony. As has been held, a defective verification would serve only to check the proceedings until a proper verification is made. *In re Eastern Supply Co.*, Bankruptcy No. 22947 (W. D. Pa. 1959); *In re Royal Circle of Friends Bldg. Corporation, supra; Green River Deposit Bank v. Craig, supra.*

An order will be entered denying the motions.

ORDER OF COURT

AND NOW, to-wit, this 30th day of March, 1959, after argument and upon due consideration of the briefs, IT IS ORDERED that defendant's motions in arrest of judgment and for a new trial be and the same hereby are denied. The United States Attorney is directed to produce the defendant for sentencing on Monday, April 13, 1959, at 9:30 A.M.

(signed) RABE F. MARSH
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,921

UNITED STATES OF AMERICA
v.
WALTER ELWOOOD KRAMER,
Appellant.

Appeal From the United States District Court for the Western District of Pennsylvania

Argued October 9, 1959
Before BIGGS, Chief Judge, and MCLAUGHLIN and STALEY, Circuit Judges.

Opinion of the Court

Filed December 11, 1959

By BIGGS, Chief Judge.

The defendant-appellant, the bankkrupt Kramer, was found guilty on one count of a multiple count indictment charging him with violation of 18 U.S.C.A. § 152 in that he concealed assets from a receiver and a trustee in a bankruptcy proceeding. The evidence presented was clearly sufficient to justify his conviction. Seeking to set aside the judgment of conviction, Kramer makes a collaterial attack upon the bankruptcy proceeding itself and presents a number of arguments only one of which requires discussion.

Appendix B.

Section 18(a) of the Bankruptcy Act, as amended, 11 U.S.C.A. § 41(a), provides that service of a subpoena shall be made upon the person named as the defendant, or bankrupt, and that, "Such service shall be returnable within ten days unless the court shall, for a cause shown, fix a longer time, and shall be made at least five days prior to the return day. . . ." Section 18(a) goes on to provide that ". . . in case personal service cannot be made within the time allowed, then notice shall be given by publication in the same manner as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States. . . ."

The petition of involuntary bankruptcy was filed against Kramer and his wife on December 11, 1957. The subpoena shows on its face that it was attested by the court below on December 11, 1957 and was issued on the same day. Pursuant to Section 18(a) the service of the writ was made returnable within ten days, by December 21, 1957, and was required to be made at least five days prior to the return day; *viz.*, by December 16. According to his own testimony the Marshal made his initial attempts at service on December 17, 1957, only four days before the return date, when he tried to serve the subpoena on Passafiume, an attorney who had in the past been employed by Kramer. No attempt was made to serve Kramer personally until December 19, 1957. The attempt to serve Kramer through Passafiume was a nullity even if it had been sought to have been made within the statutory five day period since service must be made on the subpoenaed party himself. The Marshal made a return of N.E.I. on the writ on December 24, 1957. The record discloses no order extending the time for service "for cause shown". It follows, therefore,

that service was not made or even attempted to be made on Kramer as required by law. It also appears that Kramer was within the jurisdiction and in and about the greater Pittsburgh area from December 11 to December 21.[1]

Service by publication of Kramer was then had. On its face this service was adequate in form but it was clearly the intention of the draftsmen of Section 18 that service by publication should not be resorted to unless personal service was first attempted to be made as prescribed by the section and personal service had failed. It is necessary to conclude, therefore, that the service by publication on Kramer was insufficient to enable the court to obtain jurisdiction of his person. It follows that if there were no further cogent circumstances which require consideration we would be compelled to conclude that the judgment of conviction here appealed from could be attacked successfully collaterally and would have to be vacated.

But on April 22, 1958 Kramer filed in the court below a petition for an arrangement under Section 321, Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 721, in the original involuntary proceedings.[2] It must be noted that Section 321 provides that, "A debtor may file a [Chapter XI] petition under this chapter in a pending bankruptcy proceeding either before or after his adjudication." It is apparent that Kramer filed the petition pursuant to the statutory provisions quoted. Under all the circumstances we hold that Kramer must be deemed

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1. See the opening statement for the prosecution which appears to find corroboration in the record.

2. This petition was denied on July 31, 1958.

to have submitted his person to the jurisdiction of the bankruptcy court. See In re Sage, 224 Fed. 525 (E.D. Mo. 1915); In re Western Inv. Co., 170 Fed. 677 (E.D. Okla. 1908) The right to be served according to law deserves judicial protection but we would be guilty of undue emphasis on technicalities if, on collateral attack, we found a fatal defect in service in a proceeding in which the appealing party not only had actual notice of the action against him but participated in the case to the extent of voluntarily requesting a Chapter XI composition in the same proceeding.

The judgment of conviction will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,921

UNITED STATES OF AMERICA
v.
WALTER ELWOOD KRAMER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present:
BIGGS, Chief Judge, and MCLAUGHLIN and STALEY,
Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

December 11, 1959

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,921

UNITED STATES OF AMERICA
v.
WALTER ELWOOD KRAMER,
Appellant.

Present:
BIGGS, Chief Judge, and MCLAUGHLIN and STALEY,
Circuit Judges.

Sur Petition for Rehearing

After due consideration the petition for rehearing in the above-entitled case is hereby granted.

BY THE COURT
BIGGS, Chief Judge

Dated: March 18, 1960

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,921

UNITED STATES OF AMERICA
v.
WALTER ELWOOD KRAMER,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 9, 1959
Reargued April 8, 1960
Before BIGGS, *Chief Judge*, and MCLAUGHLIN and STALEY, *Circuit Judges*

Opinion of the Court
(Filed June 21, 1960)

By BIGGS, *Chief Judge*.

The defendant-appellant, the bankrupt Kramer, was found guilty on one count of a multiple count indictment charging him with a violation of 18 U.S.C.A. §152 in that he concealed assets from a receiver in bankruptcy during the period from December 20, 1957 to March 19, 1958. The evidence presented was clearly sufficient to justify his conviction. Seeking to set aside the judgment of conviction, Kramer attacks the judgment on several grounds. Only two of these merit discussion. Kramer alleges that neither he nor his wife Dolores, either individually or as partners, were ever properly served with process pursuant to the provisions of Section 18(a) of

the Bankruptcy Act and that therefore no valid bankruptcy proceedings were ever commenced and consequently he may not be found guilty of concealing assets from a receiver who had no legal existence at the time of the concealment charged in the first count of the indictment.

Section 18(a) of the Bankruptcy Act, as amended, 11 U.S.C.A. §41(a), provides that service of a subpoena shall be made upon the person named as the defendant, or bankrupt, and that, "Such service shall be returnable within ten days unless the court shall, for a cause shown, fix a longer time, and shall be made at least five days prior to the return day. . . ." Section 18(a) goes on to provide that ". . . in case personal service cannot be made within the time allowed, then notice shall be given by publication in the same manner as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States. . . ."

The petition of involuntary bankruptcy was filed against Kramer and his wife and against their partnership on December 11, 1957. The subpoena shows on its face that it was attested by the court below on December 11, 1957 and was issued on the same day. Pursuant to Section 18(a) the service of the writ was made returnable within ten days, by December 21, 1957, and was required to be made at least five days prior to the return day; *viz.*, by December 16. According to his own testimony the Marshal made his initial attempts at service on December 17, 1957, only four days before the return date, when he tried to serve the subpoena on Passafiume, an attorney who in the past had been employed by Kramer. No attempt was made to serve Kramer personally until December 19, 1957. The attempt to serve

Kramer through Passafiume was a nullity even if it had been sought to have been made within the statutory five day period since service must be made on the subponaed party himself or upon someone qualified to receive service for him. The Deputy Marshal made a return of N.E.I. on the writ on December 24, 1957. The record discloses no order extending the time for service "for cause shown." It follows, therefore, that personal service was not made or even attempted to be made on Kramer as required by law. It also appears that Kramer was within the jurisdiction and in and about the greater Pittsburgh area from December 11 to December 21, 1957. It is stipulated that Kramer departed for Florida on December 21, 1957.

The testimony of the Deputy Marshal who attempted to serve Kramer personally, received at the trial in the instant case, demonstrates that he made strenuous efforts to locate and serve Kramer with the subpoena while he was still in Pennsylvania, albeit not within the time and in accordance with the specific terms of Section 18(a). Kramer could not be found at his office or the place of his customary abode, and he stated to the Deputy Marshal at a later date that he might have been found at the "Holiday House," a night club near Pittsburgh. The inference could be drawn that he was evading service. It should be noted that if Kramer could have been found effective personal service could have been made upon him by an extension of the return date by the court as provided by Section 18(a).

Personal service not having been made on Kramer, the attorney for the petitioning creditors on December 27, 1957 filed a petition for service on him by publication accompanied by an adequate supporting affidavit. On the

same day the court made an order requiring Kramer to appear, to plead, to move, or to answer the petition for involuntary bankruptcy on or before January 10, 1958. The order expressly provided that if on the return day Kramer was in default the petitioning creditors should have the relief prayed for in their petition for involuntary bankruptcy. The court required that the order for service by publication should be published in the Pittsburgh Press on or before the 30th day of December, 1957 and that a copy of the order and the subpoena should be mailed to Kramer at his last known address, 224 Lincoln Highway, East McKeesport, Pennsylvania. Publication was made as required by the court's order and a registered letter with the order was sent as required.[1] Kramer did not appear as required and on January 30, 1958 the court below entered an order adjudicating the partnership and the individual partners thereof, Kramer and his wife, Dolores, bankrupts. On the same day the court entered an order appointing the receiver.

Section 18(a) provides that service by publication shall not be resorted to unless personal service cannot

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1. This appears from a copy of the affidavit of service by publication and registered mail signed by Hyman Borvetz, Esquire, now dead, the attorney for the petitioning creditors. The original of the affidavit is not in the record as certified to this court and search by the Clerk of the court below has failed to disclose its whereabouts. Kramer, however, does not attack the validity of the affidavit and it has been stipulated that he "was served by publication in the Pittsburgh Press on December 30, 1957." In addition to the foregoing, a photostatic copy of publication of the order of the court in "The Pittsburgh Press" on December 30, 1957 and an accompanying affidavit of publication dated June 1, 1960, has been certified to this court by the Clerk of court below.

be made on the alleged bankrupt by the times prescribed by the statute.[2] If the words of the section be construed literally, one would be compelled to conclude that if there was a failure of personal service due to any negligence on the part of the United States Marshal to make the service or to make the return by the times prescribed, no second attempt at personal service could be valid for the statute makes no specific provision for a second attempt of personal service if the first attempt was invalid or unsuccessful for any reason. The language of the section can also be read as providing that if personal service could have been made on the alleged bankrupt within the state of the bankruptcy court and was attempted but was not made as prescribed by the section and the alleged bankrupt fled the state after

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2. Section 18(a), 11 U.S.C.A. §41(a), as it existed prior to the 1959 amendment, provided: "Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpena, shall be made upon the person therein named as defendant. Upon the filing of a voluntary petition in behalf of a partnership by less than all of the general partners, service thereof, with a writ of subpena, shall be made upon the general partner or partners not parties to the filing of such petition. Such service shall be returnable within ten days, unless the court shall, for cause shown, fix a longer time, and shall be made at least five days prior to the return day, and in other respects shall be made in the same manner that service of summons is had upon the commencement of a civil action in the courts of the United States; but in case personal service cannot be made within the time allowed, then notice shall be given by publication in the same manner as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the court shall otherwise direct the order shall be published only once and the return day shall be five days after such publication."

that attempt had been made, service could not be made thereafter by publication. Such interpretations would frustrate the obvious purpose of the Bankruptcy Act to distribute equitably the assets of the bankrupt among his creditors. We cannot accept them.

We conclude that if an attempt personally to serve an alleged bankrupt while he is within the state of the bankruptcy court has failed because it was not in accordance with the provisions of Section 18(a) and the bankrupt then leaves the state, service may be made by publication. Consequently, the issue of the asserted lack of service so vigorously pressed by Kramer's counsel is without merit.

Kramer also contends that the petition for involuntary bankruptcy filed against him, his wife, and their partnership, was not attested as required by Section 18(a). In making this contention Kramer attempts a collateral attack on the jurisdiction of the bankruptcy court over the subject matter of the suit. The decisions hold unequivocally that such an attack may not be countenanced in any case against the bankrupt, even in a criminal proceeding, where the indictment has charged the bankrupt with a violation of the Bankruptcy Act. Fairbank Eteam Shovel Co. v. Wills, 240 U.S. 642, 649 (1916); Cajiafas v. United States, 38 F.2d 3 (6 Cir. 1930); Edelstein v. United States, 149 F. 636 (8 C.C.A. 1906); and United States v. Freed, 179 F. 236 (C.C.S.D. N.Y. 1910).

The judgment of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,921

UNITED STATES OF AMERICA
v.
WALTER ELWOOOD KRAMER,
Appellant

On Appeal From the United States District Court for the Western District of Pennsylvania

Present: BIGGS, Chief Judge; and McLAUGHLIN and STALEY, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

June 21, 1960

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. ..., October Term, 1960

WALTER ELWOOD KRAMER,

Petitioner,

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 20, 1960.

(S) WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States.

Dated this 1st day of July, 1960.

APPENDIX H

Testimony

WILLIAM I. CONRAD (Cross Examination)

Q. Let me refresh your recollection. It was the day before the petition in bankruptcy was filed, which is Government's Exhibit 26. Do you recall that?

A. Yes, sir.

The Court: What exhibit?

Mr. Banks: Twenty-six, your Honor,—twenty-one, your Honor.

The Court: Now, we have an awful lot of these exhibits, and I caution counsel that if a reviewing court looks over this record, we want to have them stated accurately.

Mr. Banks: I'm sorry, your Honor.

By Mr. Banks:

Q. Is that your signature?

A. It is.

Q. You signed that the night of the meeting, didn't you?

A. I did.

Q. There wasn't any notary public out there at that meeting that night, was there?

A. To the best of my knowledge, no.

Mr. Banks: That's all.

Appendix H.

FRANK VILLI (Direct)

Q. What was the decision reached at the meeting?

A. Well, it was reached that we would put the man in bankruptcy since we couldn't locate him.

Q. And did you sign the petition?

A. Yes, sir.

Q. Where did you sign it?

A. I signed it at our office.

FRANK VILLI (Cross Examination)

Q. Are those your signatures on Government's Exhibit 21?

A. Yes, sir.

Q. Up there and down here?

A. Yes, sir.

Q. Where did you sign those?

A. At my office in McKeesport.

Q. Both of them?

A. Yes, sir.

Q. On the 10th of December?

A. Well, that's the night of the creditors' meeting, if that's when December 10th was.

Q. But you signed them both on the 10th of December?

A. Yes, sir, if that was the date of the creditors' meeting.

HENRY L. JOSEFOVSKY (Cross Examination)

Q. I show you Government's Exhibit 21, which purports to be a creditors' petition, and ask you if you signed that both places there?

A. Yes, sir, I did.

Q. And you signed that the night of the creditors' meeting, isn't that correct?

A. Yes, sir, I did.

Q. You never signed it before a notary public, isn't that true?

A. Not to my knowledge.

Q. Thank you sir. You mean your knowledge is that you never signed it before a notary public?

A. That's right.

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No. 343

In the Supreme Court of the United States

OCTOBER TERM, 1960

WALTER ELWOOD KRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. 34-37, 40-45) are not yet reported. The opinion and order of the district court are reported at 172 F. Supp. 288.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1959. A petition for rehearing was granted on March 18, 1960, and on June 21, 1960, the court of appeals entered judgment affirming the

district court. On July 1, 1960, by order of Mr. Justice Brennan, the time for filing a petition for a writ of certiorari was extended to August 20, 1960. The petition for a writ of certiorari was filed on August 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an improper verification of a bankruptcy petition prevents a conviction for concealing assets from a receiver in bankruptcy.

2. Whether an adjudication of bankruptcy, based upon service by publication after unsuccessful personal service less than five days before the return day, is sufficient to sustain a conviction for concealing assets from a receiver in bankruptcy.

STATUTES INVOLVED

18 U.S.C. 152:

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt * * *
>
> * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 18(a) of the Bankruptcy Act, 11 U.S.C. 41(a), provides:

> Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpena, shall be made upon the person therein

named as defendant. Upon the filing of a voluntary petition in behalf of a partnership by less than all of the general partners, service thereof, with a writ of subpena, shall be made upon the general partner or partners not parties to the filing of such petition. Such service shall be returnable within ten days, unless the court shall, for cause shown, fix a longer time, and shall be made at least five days prior to the return day, and in other respects shall be made in the same manner that service of summons is had upon the commencement of a civil action in the courts of the United States; but in case personal service cannot be made within the time allowed, then notice shall be given by publication in the same manner as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the court shall otherwise direct, the order shall be published only once and the return day shall be five days after such publication.

* * * *

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Pennsylvania on one count of an indictment charging the knowing and fraudulent concealment of property from the receiver of an estate in bankruptcy in violation of 18 U.S.C. 152 (Pet. 5-6). The conviction was affirmed on appeal.

The following facts are not disputed by petitioner:

Petitioner, in partnership with his wife, operated Kramer Builders in Pittsburgh (Pet. 31). On De-

cember 11, 1957, an involuntary petition in bankruptcy was filed in the United States District Court for the Western District of Pennsylvania against petitioner and his wife, individually and as partners doing business as Kramer Builders (Pet. 6).

A copy of the petition and a summons to petitioner and his wife were given to the United States Marshal on December 11, the summons returnable on December 21, 1957. The marshal did not attempt to serve petitioner until December 17, 1957, when he requested Joseph Passafiume, whom the creditors believed to be petitioner's attorney, to accept service on petitioner's behalf, which Passafiume refused to do. The marshal sought petitioner in the Pittsburgh area on December 17, 1957, and thereafter, but was unable to locate him. The record shows no order extending the time for personal service.

Permission for service by publication was secured on December 27, 1957, and publication was made in the Pittsburgh Press on December 30, 1957. Personal service was made on petitioner's wife in Florida on the same day. On January 30, 1958, petitioner and his wife, individually and as partners, were adjudicated bankrupts and a receiver appointed. A trustee of the bankrupt estate was appointed on March 20, 1958. Petitioner, who had gone to Florida on December 21, returned to Pittsburgh on March 19, 1958. On March 25, 1958, he appeared for questioning in a hearing under Section 21(a) of the Bankruptcy Act (11 U.S.C. 44). On April 22, 1958, he filed a petition for an arrangement under Section 321 of the Bankruptcy Act (11 U.S.C. 721).

The concealment charge on which petitioner was convicted alleged concealment from the receiver from December 20, 1957, to March 19, 1958, with intent to defraud the bankrupt estate and the creditors of the estate. On December 21, 1957, petitioner had left Pittsburgh and had picked up some of the partnership's heavy equipment which he had previously parked at the entrance to the Pennsylvania Turnpike, and transported it to Florida. It was recovered after the trustee in bankruptcy was appointed.

In the courts below (as in this Court), petitioner, who had not attacked the jurisdiction of the bankruptcy court in the bankruptcy proceeding, argued that the adjudication and the appointment of a receiver were void because (1) two of the petitioning creditors had not properly verified the petition before a notary public, and (2) service by publication was invalid since personal service had not been attempted until less than five days before the return day of the original subpoena. The district court ruled that any defects in the verification or in the service of the subpoena could be attacked only in the bankruptcy court, and not collaterally in the criminal proceeding (Pet. App. 33). The Court of Appeals, in its final opinion, took the same approach as to verification but considered the merits of the attack on service by publication, ruling that (Pet. App. 45) "if an attempt personally to serve an alleged bankrupt while he is within the state of the bankruptcy court has failed because it was not in accordance with the provisions of Section 18(a) and the bankrupt then leaves the state, service may be made by publication."

ARGUMENT

1. Petitioner does not challenge the sufficiency of the evidence to show that he knew that a bankruptcy proceeding was pending against him and that he willfully concealed assets. His contention is that the adjudication in bankruptcy and the appointment of a receiver were so totally void that he could not be found guilty of concealing assets from the receiver. The short answer to petitioner's contentions is that the mere filing of a petition in bankruptcy gives the bankruptcy court jurisdiction over the property of the putative bankrupt within the jurisdiction of the court. *Ex Parte Baldwin*, 291 U.S. 610, 615. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and the distribution of his estate. *Acme Harvester Co.* v. *Beekman Lum. Co.*, 222 U.S. 300, 307. Therefore, when the petition for involuntary bankruptcy was filed, petitioner was no longer free to deal with his property in such a way as to defeat the legitimate claims of the creditors. *Ex Parte Baldwin, supra.*

Directly in point is the decision of the Second Circuit in the case of *United States* v. *Agresti*, 130 F. 2d 152, where a petition, intended to be against Agresti, was filed against Marrone, a name which Agresti used. The court assumed, arguendo, that service by publication against Agresti under the name of Marrone was invalid. It held that, nevertheless, Agresti could be convicted of concealing assets from

the receiver of an estate of the bankrupt,[1] saying (*id.* at 154):

> * * * Therefore, at worst a petition was pending to adjudicate Agresti, under which a receiver was appointed who took possession of Agresti's property. This was "property belonging to the estate of a bankrupt" because under § 1(4) the word "bankrupt" includes a person against whom an involuntary petition has been filed. When the creditors elected that receiver as their trustee, the appointment may have been a nullity—depending again upon the sufficiency of the publication—but, even if so, the receiver remained a receiver in possession. Section 29, sub. b(1) makes it a crime to conceal assets "belonging to the estate of a bankrupt" from a receiver as well as from a trustee * * *.

2. In any event, petitioner's assertions of defects in the proceedings do not establish that the appointment of a receiver was invalid so as to be subject to attack in the criminal action.

(*a*). As to verification, the requirement of verification of petitions for involuntary bankruptcy is not jurisdictional in the strict sense. It may be waived by the bankrupt, or the court may permit the petitioners to perfect the verification. *Armstrong* v. *Fernandez*, 208 U.S. 324, 330; *In Re Royal Circle of Friends Building Corporation*, 159 F. 2d 539, 541-542 (C.A. 7). The instances in which a petition

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[1] It also held that the fact that the indictment charged concealment from a trustee rather than a receiver would be an immaterial variance. No such issue is involved here since the indictment charged concealment from a receiver.

improperly verified has been dismissed in the bankruptcy proceeding itself are those in which defects were also found in the substance of the averments. *E.g., In re Frank*, 239 Fed. 709 (C.A. 3); *In re Watauga Steam Laundry*, 7 F.R.D. 657, 659 (E.D. Tenn.). Petitioner does not claim any fraud in the substance of the allegations made in the involuntary bankruptcy petition. The defective verification is therefore not a basis for collateral attack in a criminal action. See *Edelstein* v. *United States*, 149 Fed. 636 (C.A. 8), certiorari denied, 205 U.S. 543; *Cajiafas* v. *United States*, 38 F. 2d 3 (C.A. 6); *United States* v. *Freed*, 179 Fed. 236, 237 (S.D. N.Y.).

(*b*). As to the service by publication, it is undisputed that petitioner was not in the district when service by publication was authorized and had not been there for six days. It is also undisputed that attempts to serve petitioner between December 17 and December 21, when he left the area, had proved futile. No attack is made on the manner of publication; rather, the argument is that the service by publication was invalid because personal service had not been attempted until less than five days before the return day of the original subpoena and no order extending the time for service had been obtained. As the court below pointed out, the literal reading of the statute, for which petitioner argues, would mean that any time there was a defect with respect to any attempted personal service there could be no service by publication even though the alleged bankrupt fled the state (Pet. 45). The court below

properly refused to interpret the statute to reach a result so at variance with the obvious purpose of its provisions. See *Romero* v. *International Terminal Co.*, 358 U.S. 354, 360; *United States* v. *Brown*, 333 U.S. 18, 25. The manifest purpose of the statute is to permit service by publication when it is impossible to effectuate personal service. Since in this case, at the time publication against petitioner was authorized, it was, and for some time had been, impossible to serve him personally, service by publication was proper and sufficient to confer jurisdiction on the bankruptcy court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1960.

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